NO. 22506

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUL 7 1969

RUSSELL O. LAW,

Appellant,

vs.

JOINT CHECKER LABOR RELATIONS COMMITTEE, SAN FRANCISCO, an unincorporated association, PACIFIC MARITIME ASSOCIATION, an unincorporated association, ILWU, an unincorporated labor union, ILWU, LOCAL 34, an unincorporated labor union, MATSON TERMINALS, INC., a California corporation, et al.,

Appellees.

On Appeal from the United States District Court
For the Northern District of California
Southern Division

SUGGESTION THAT REHEARING BE CONSIDERED IN FULL COURT - RULE 35 (REHEARING IN BANC)

PETITION FOR REHEARING

HOWARD B. CRITTENDEN, JR.
111 Sutter Street, Suite 817
San Francisco, California 94104
EXbrook 7-5288

Attorney for Appellant

FILED
JUL 1 [illegible]

TO THE HONORABLE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT:

The appellant, RUSSELL LAW, herewith suggests it is appropriate:

1) The rehearing in this matter be considered by the full Court under Rule 35 as a rehearing in banc,

a) as it is necessary to obtain a uniformity of decisions;

b) as this case involves a question of exceptional im-importance.

2) The important facts appearing in the record and stated with citations to the record in Appellant's Opening and Reply Briefs and the points of law raised were overlooked in the opinion published by this Court, and appellant petitions for a rehearing of the decision of June 18, 1969. The following facts do not appear in the opinion:

LAW was barred from his livelihood of over 9-1/2 years and his sole means of support as a full time shipclerk upon a trial in absentia, without notice or hearing or an opportunity to appear or defend himself or present his side, upon the charge of only one of over a hundred shipclerk employers in this Port. He sought every remedy and was refused it. He filed this Sec. 301 action.

The record shows LAW was dispatched for a single day to Matson Terminal, Inc. as a shipclerk and worked as such loading the S.S. Dant on November 23, 1964, and was paid for only 7-1/2 hours, not for the 8 hours he worked. He took up this pay shortage and sought throughout to exhaust his remedy, without so much as a hearing at any stage. On December 3, 1964, the Matson Terminals had this

employer's association PMA forward charges to defendant Local 34 (of which LAW was not a member). Local 34 sent a copy to a former address of his, although he had lived in his home for several years and his correct address was shown on several yearly W-2 forms and his checks to the Union for their charges carried his proper address, and the Union elected dispatcher at the Oakland Hiring Hall had his telephone number and saw him daily.

On January 13, 1965, LAW was sent by the dispatcher to the Union Hall at San Francisco where he met with a local Union Committee for but a few minutes and was told of the charges of Matson Terminal. The record shows the brevity of the conference and the individual members testimony shows the differences of their understanding as to what LAW explained had happened. He was led to believe these union members intended to protect him and fight his cause. The first step in the grievance procedure is the defendant, Joint Checker Labor Relations Committee, in which both the employer representatives and the employee representatives each must agree for there to be any conviction of LAW, or any action.

On January 13, 1965, one of these Union members, HERMAN, stated to the Port Committee of which he was an employee member, that LAW admitted the charges as factual, although the other Union members of the Committee as for example ROBB testified he understood there was some kind of mistake in loading when LAW was trying to follow the direction of his supervisor, LAW discovered the mistake, reported it and it was corrected. Although it took both votes of the employer and employee members, the testimony was the Union members did not vote and acquiesced in LAW being convicted and barred from any future employment

as a shipclerk by any of the more than a hundred employees of shipclerks in this Port.

There was clearly a violation of the duty of the exclusive statutory bargaining agents to LAW and actionable under Vaca v. Sipes, 386 U.S. 171, in a Sec. 301 action. This statutory agent, the defendant I.L.W.U., did nothing, at any time. It purported to delegate its discretion and judgment as well as responsibility to defendant Local 34 whose book members alone elected the Port Committee employee representatives and even the dispatcher who gave out the jobs.

The record clearly points up the situation:

1) Local 34 book members are those "registered" and who are then dispatched in priority to those such as LAW who are not permitted full book membership. Book men are dispatched for the duration of the job while the Ship is in Port while LAW and other "social security men" (book men have registration and registration members and non-union men are listed by social security numbers) have but a dispatch for a single day. Not only do Union members alone elect the dispatcher who gives out the job but also the employee member of defendant Port Committee. Fringe benefits are generated on all employee's pay by individual employers but used solely for full book members of Local 34, not for LAW and the other social security men.

2) The provisions of the written collective bargaining agreement as published are not followed. Secret oral understandings, customs from breaches of this published written contract and undisclosed actions of the various committees are enforced as the bargaining agreement. This case points up the fact an unpublished and yet unsigned document as to employer's

grievances against individual shipclerks had been applied for several years in such matters. This document was not signed or published until the latter half of 1966, long after LAW'S matter. Had it been applied to him, he could not have been adjudicated guilty as it applied to offences of pilfering, work stoppage, etc., not mere errors in judgment or negligence.

3) A different procedure was applied to Union book men than applied to social security (non-Union) men on employer grievances against individual shipclerks.

4) Even the minutes of the defendant Committee recites that since LAW was a social security man, the defendant PMA demanded his punishment be permanent barring from dispatch. Although this harsh punishment was rarely applied, it shows a different standard applied to Union and non-Union shipclerks.

5) The laws of Congress have attempted to prevent a different treatment of Union and non-Union employees and spell out clearly the maintenance of membership provisions, and require a Union to accept all employees to full membership if they pay reasonable initiation fees and keep up their dues, if there are any provisions as to maintenance of membership in the contract. No employer can favor nor can a Union require him to favor, one employee over another because of Union membership or lack of it. The PMA and I.L.W.U. until 1952 had a provision in this bargaining agreement granting preference of employment and dispatch to Union members. This was held illegal and void in NLRB v. Waterfront Employer, 9 Cir, 211 F 2d 946. To avoid and frustrate this decision, the PMA and I.L.W.U. made

another contract granting preference in employment and dispatch to those illegally registered and picked a seemingly innocent priority date of employment in 1952 before the N. L. R. B. decision. They also wrote into the contract that "registration" which is the key to this special benefit would be granted on the "joint consent" of the PMA and the Union. Of course, only slightly over half of the regular working force are then admitted into the local Union as full book members and, of course, only full book Union members are fully registered. Thus, on the waterfront book men mean "registered" which is the key to priority of dispatch and employment, receipt of fringe benefits including the jointly construed Health and Welfare Fund, Pension Fund and the multimillion dollar Mechanization Fund, and even vacation pay. The Union keeps its doors closed to all but a select few. Where there is selection, the bourgeois (of which LAW is one as the record shows he was formerly in the used car business on his own account) are not admitted to a predominantely proletarian Union. Even the grievance procedure varies depending on whether the shipclerk is a full book member of the Union, as does the consequences.

6) Whether or not LAW'S conduct on November 23, 1964 in his shipclerk's work on loading the Dant merits discipline under the applicable collective bargaining agreement depends on what that agreement is. This Court's decision, as does the trial court's decision, completely avoids this. In any event, no man can be tried in absentia without adequate notice of the charges and without an opportunity to defend himself. Any grievance procedure cut from this material is too foreign to our concept of fair play to stand. See Humphry v. Moore,

375 U.S. 335. Any statutory collective bargaining agent who delegates its responsibility and judgment to another and which in this case is Local 34, leaves the protection of non-Union employees to such as appears in this record of a deseltory, deceptive and improper representation, as shown in the record where the various Union members understood LAW'S explanation differently, in but a few minutes of meeting with him, promised to protect him and defend him and represent him and then went in and in fact voted against him. For the Committee to be able to act, it needed both the employer representative's vote and the employee's members vote.

ADDITIONAL MATTERS

It may well be that a non-Union shipclerk is, as respondent's counsel stated at the oral argument, a third-class citizen. He may have no rights the employer or Union or statutory exclusive bargaining agent are bound to respect. However, he is not outlawed and civilly dead. He should have a right to come to this Court and have the relevant facts as stated in the record and cited in his counsel's brief included in the Court's opinion. If, on the matter of law on these facts, the Court does not agree in whole or in part, it should so state the law involved:

1) Is it the law a non-Union shipclerk solely because he is not admitted to Union book membership is to be subject to different grievance procedures? Different and more harsh punishment?

2) May any shipclerk be subject to trial in absentia, without adequate notice, without an opportunity to appear and defend himself and

be forever barred from his sole means of support of many years?

3) May a shipclerk be called into a Union Committee meeting for fifteen minutes, so short that the various committee members each understood it differently, be told he is not to blame and he would be defended and protected, and then have these same committee men go into a meeting of another committee and then permit him to be convicted and to have a vlid action of that committee, join in barring him from the sole source of his livelihood, in the first step of the grievance procedure? When he attempts to seek the next step can he be denied all other remedies? Is this fair and adequate representation by the exclusive statutory bargaining agent?

4) May a collective bargaining agreement make full book members of Local 34 superior first-class citizens, let the Union arbitrarily close its doors to about half of the full time working force dependent on employment as shipclerks for a livelihood, require "registration" to be by "mutal consent" of the employer's association and the local Union, so only full book Union members in this working force have priority of dispatch and employment as "registered", get the sole benefit of all fringe benefits and priority of treatment in grievance; provide for election of the dispatcher and representatives on the Port Committee solely by full book members, not by all of the full time members of the working force?

5) Can the collective bargaining agreement be so drafted as to perpetuate this special privilege to Union full book members not granted to others?

6) Can a written collective bargaining agreement be published, and then have the Union and Employers Association claim this is not in effect, but is superceded by and the real bargaining agreement is a secret oral agreement not yet reduced to writing and not yet published, changed by custom and practices in violation of the written published agreement and by minutes of the various committees, creatures of the written agreement? What is the applicable contract? Which grievance procedure is followed? As to shipclerks discipline and punishment on employer's grievances, which is applicable?

7) How far can non-Union employees be treated differently than full book members of the Union without violating the laws of Congress on maintenance of Union membership or preference of one over another because of lack of a particular Union's membership?

The bound law reports are full of cases where eminent counsel believed the law different and the appellate court got the last guess. No complaint can be made if the Court states the law as it sees it. To avoid stating the material facts and to not mention the points of law raised by them goes to the very right of a litigant to a review on appeal.

This is a very difficult petition to write. The first impression was to roll with the times and save the trouble of a petition. However, counsel's obligation is to present his client's cause to the best of his ability. He would be timerous were he to avoid his duty to this Court and to his client. To avoid this difficult duty would mark counsel with the moral decay so apparent from the lack of security manifested in the turmoil and lawlessness shocking our society.

The facts in the record and the points of law raised by them in this appeal goes to the very essence of our concepts of justice, grievance procedures and collective bargaining agreements. It is important to non-Union shipclerks that they have a Sec. 301 action when their livelihood is involved. It is important that the appellant have the facts in the record fully stated and the law raised by the facts decided.

We urge this as a matter of exceptional importance requiring a consideration by the full Court to secure and maintain a uniformity of decisions.

HOWARD B. CRITTENDEN, JR.
Attorney for Appellant

CERTIFICATE OF COUNSEL

I, HOWARD B. CRITTENDEN, JR., do hereby certify that the foregoing petition for rehearing and suggestion under Rule 35 in this cause is presented in good faith and not for the purpose of delay.

HOWARD B. CRITTENDEN, JR.